United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1547

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1547

ANNELOU TEIXEIRA, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

—against—

MORAL RE-ARMAMENT INC. and UP WITH PEOPLE, INCORPORATED,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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WM. LEE KINNALLY, JR.

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BRIEF OF PLAINTIFF-APPELLANT

Issues for Review.

This is an appeal from an opinion and judgment of United States District Judge Arnold Bauman dated February 25, 1974 in which this action was dismissed as a class action and Appellee Up With People Incorporated (hereinafter "UWP") was granted summary judgment pursuant to Fed. R. Civ. P. 56 (106a -119a.).*

* Unless otherwise indicated, numbers in parenthesis refer to the pages of the joint appendix.

The purpose of this appeal is to review the decision of the Court below as to these two determinations.

Statement of the Case.

This action was commenced as a class action pursuant to which Plaintiff sought to enjoin Appellee Moral Re-Armament, Inc. (hereinafter "MRA") from contributing any further sums from its so-called "Life Income Fund" to UWP (5a-11a). Plaintiff alleged in her complaint that she was a member of a class " . . . all of whom have contributed funds to the Life Income Fund of M.R.A. . . . upon the representations that said contributions would be used to advance the purposes and goals of M.R.A." (6a). Plaintiff executed two Life Income Agreements on June 21, 1965 and August 5, 1965 pursuant to which she contributed $50,000.00 to the Life Income Fund of MRA (8a). Plaintiff, on behalf of herself and all of the persons who have made such contributions, seeks to compel MRA to apply such contributions to the express purposes of the Moral Re-Armament movement as set forth in its certificate of incorporation, and to refrain from contributing funds from its Life Income Fund to UWP.

Plaintiff moved pursuant to Fed. R. Civ. P. 23(c) and S.D.N.Y. R. 11A for an order determining whether the action was maintainable as a class action and, if so, the membership of the class (12a-17a).

Appellees moved for summary judgment, Fed. R. Civ. P. 12(b)(6) and 56, and opposed the aforesaid motion of Plaintiff under Fed. R. Civ. P. 23(c) and S.D.N.Y. R. 11A.

All three motions were treated and disposed of by Judge Bauman in his opinion and judgment of February 25, 1974 (106a-118a). In sum, Plaintiff's motion for a determination as to class action status was denied; the motion of MRA for summary judgment was denied; and the motion of UWP for summary judgment was granted (116a).

Jurisdiction below was based upon 28 U.S.C. §1332. This appeal is taken pursuant to 28 U.S.C. §1291.

Statement of Facts.

Plaintiff entered into two Life Income Agreements with MRA on June 21, 1965 and August 5, 1965 pursuant to which she transferred the aggregate sum of $50,000.00 to the so-called "Life Income Fund" of MRA (8a). During her lifetime, Plaintiff is to receive the income earned from the investment and reinvestment of her contribution (8a). Kidder, Peabody and Company is designated as the custodian of the securities acquired with the contribution of Plaintiff (22a).

The complaint alleges a single cause of action seeking to enjoin MRA from making any further contributions to UWP from its Life Income Fund (11a). Brought as a class action, Plaintiff seeks

to enjoin the transfer to UWP of any of the Life Income Fund and to enjoin UWP from accepting such contributions (11a).

MRA, incorporated in New York in 1941 as a nonprofit corporation, states in its corporate charter that it was founded for the following purposes:

> "A. The advancement of the Christian religion, and in particular by the means and in accordance with the principles of THE OXFORD GROUP and FIRST CENTURY CHRISTIAN FELLOWSHIP, founded by Frank Nathan Daniel Buchman, and its program of MORAL RE-ARMAMENT, whose aim is personal, social, racial, national and supernational salvation.
>
> "B. To disseminate Christian teachings among the people of the United States and other countries by means of the preparation, publication and circulation of magazines, pamphlets, books, songs, music and other writings, or by means of radio or television broadcasts, or the use of sound or motion picture films.
>
> "C. To engage in one or more activities of a religious, charitable or educational nature which may be necessary or proper to carry out said purposes or objects." (emphasis added)

To achieve these ends it is specifically empowered:

> "To establish and support, or aid in the establishment and support, of any religious, charitable or educational associations or institutions, and to contribute money for religious, charitable or educational purposes in any way connected with the purposes of the corporation or calculated to further its purpose." (107a)

Plaintiff asserts that prior to making her aforesaid contribution, MRA represented to her that her contribution would be used and employed toward the attainment of the goals and purposes reflected in its Certificate of Incorporation (107a). Clearly, the corporate purposes of MRA are of a religious nature designed to further and promote the doctrine and teachings of the moral re-armament movement established by the late Dr. Frank Buchman.

As stated by its executive vice-president and director, Donald P. Birdsall, UWP is an educational and charitable institution (21a, 33a). Indeed, the federal government has granted it tax exempt status solely on this basis (33a). Notwithstanding the fact that most of its officers and directors were formerly associated with MRA, UWP does not seek to further the interests of the moral re-armament movement. Instead, this charitable status is reflected by a program which provides scholarships to youths from every social, racial, religious and economic background (33-4a).

The Certificate of Incorporation of UWP states in part:

> "(a) The specific activity in which the corporation is primarily to engage is the organization, coordination and education of individuals and groups with a view toward developing leadership, responsibility and understanding among individuals, races, classes, cultures and nations." (63a)

Not only are the stated purposes of MRA and UWP vastly dissimilar, but their endeavors and functions have no resemblance whatsoever. The only connection between the two corporations is the contribution of money from MRA to UWP.

J. Blanton Belk, president and chairman of the board of UWP, was quoted as follows:

> "There is no connection between the Tucson-based Up With People and its founding organization, Moral Re-Armament, J. Blanton Belk, Jr., head of the youth-oriented endeavor, said yesterday.
>
> * * *
>
> . . . Belk refused to discuss any connection between Up With People and Moral Re-Armament or to answer questions about the group's origins." (66a)

Stewart Lancaster, a former officer of UWP, was quoted in the New York Times on August 10, 1970 as follows:

> "'M.R.A. is a religious thing,' Mr. Lancaster said, 'and we were looking for a new means of expression. Affiliation with M.R.A. was a handicap. I think that organization has seen its day. M.R.A. activity now is nothing but a drop in the bucket compared with its heyday. When Dr. Buchman was living, he had shows going all over, as well as publications and films.
>
> But limited and rigid religious or political views, closely held, prevent growth. Many true-believer causes are dwindling today. Many are worthy but dogmatic and opinionated. Up With People is searching for a new life style with an open frame of mind.'" (66a-67a)

Again, the only connection between the two corporations is monetary. Since 1968, MRA has contributed the following amounts to UWP:

1968 - - - - - - -	$178,841.00
1969 - - - - - - -	923,892.00
1970 - - - - - - -	1,753,497.00

The I.R.S. form 990 which verifies the figure for 1970, is discussed at (66a). Moreover, MRA and UWP have never denied the accuracy of these amounts.

In instituting this action, Plaintiff seeks to prohibit MRA from giving to UWP her contribution to the Life Income Funds. As a class action, this litigation seeks to prohibit MRA from giving to UWP any contributions made to the Life Income Fund.

Argument.

POINT I

THIS ACTION IS PROPERLY MAINTAINABLE AS A CLASS ACTION

United States District Judge Arnold Bauman denied the motion of Plaintiff which sought to ascertain whether this action was maintainable as a class action solely on the ground that Plaintiff

had failed to make a positive showing that the members of the class are so numerous as to make it impracticable to bring them all before the court (109a-110a). See: De Marco v. Edens, 390 F.2d 836 (2d Cir. 1968). Indeed, Judge Bauman expressly stated that it was unnecessary for him to consider any of the other prerequisites of Fed. R. Civ. P. 23(a)(1a). He stated:

> "In light of plaintiff's failure to meet this threshold requirement, I need not further consider the satisfaction of the remaining requirements of Rule 23(a) and I necessarily conclude that this action is not maintainable as a class action." (110a)

Thus, the sole question for appellate review at this juncture is whether Plaintiff failed to meet the requirements of the statute as recited in Judge Bauman's opinion.

Plaintiff, both in her complaint and in her counsel's affidavit in support of her Rule 23(c) motion, sets forth certain pertinent facts which satisfy the requirements of the statute (6-8a; 14-17a). She alleged, and her allegations have never been denied by UWP and MRA, that the class is composed of persons who have made contributions to the Life Income Fund of MRA (15a). Thus, the identity in general of the members of the class was made known to the court.

Clearly, the specific name of each member of the class was not within the knowledge of Plaintiff and could not be alleged with

any precision or accuracy. It is hardly speculative to state that this specific information is solely in the possession of MRA or, perhaps, Kidder, Peabody and Company, as custodian of the fund.

To be maintainable as a class action, a claim must support a preliminary determination that the proposed class is capable of definition. Kriger v. European Health Spa, Inc. of Milwaukee, 56 F.R.D. 104 (D.C. Wis. 1972); Dolgow v. Anderson, 43 F.R.D. 472 (S.D.N.Y. 1968). However, it is not necessary that the members of the class be so clearly identified that any member can be presently ascertained. Carpenter v. Davis, 424 F.2d 257 (5th Cir. 1970). It has been held that failure to state the exact number in the proposed class does not defeat the maintenance of a class action so long as the proposed class is not amorphous. Siegel v. Realty Equities Corp. of New York, 54 F.R.D. 420 (S.D. N.Y. 1972); Thomas v. Clarke, 54 F.R.D. 245 (D.C. Minn. 1971); Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969), amended on other grounds, 49 F.R.D. 286.

Plaintiff clearly established that she desired to represent a specific class of persons, to wit: those persons who had made a specific contribution to the Life Income Fund of MRA. The very nature of the contribution, as specified in the Life Income Agreement, presents a common question of law and fact. The precise number and identity of the members of the class was and is unknown

to Plaintiff. However, it is abundantly clear that such information is clearly within the knowledge of MRA.

Plaintiff specifically alleged a proper and adequate definition of the class she seeks to represent. By virtue of her lack of knowledge as to the exact number and location of each member of the class, she was unable to allege with any specificity that the members of the class are so numerous as to make it impracticable to join them all.

It is respectfully submitted that Plaintiff clearly defined the class as to include those persons who have made a contribution to the Life Income Fund of MRA. The practicability of joining each member as a party was not within the knowledge of Plaintiff and, consequently, could not have been alleged by her. It should be borne in mind that it was Plaintiff who moved pursuant to Fed. R. Civ. P. 23(c) to determine whether this suit could be maintained as a class action (12a-17a). That motion was filed on March 26, 1973 (2a). It is respectfully submitted that any proper determination of the aforesaid motion of Plaintiff should have provided for inquiry by Plaintiff into the question of the practicality of joining the members of the class.

Plaintiff clearly has a beneficial interest in her contribution, as do all of the other contributors in the class. McKnight

v. Bank of New York & Trust Co., 254 N.Y. 417 (1930); Schoellkopf v. Marine Trust Co., 267 N.Y. 358 (1935). It is alleged that the members of the class signed agreements similar if not identical to those of Plaintiff. Thus, the legal and factual significance of the document is common. Moreoever, the conduct of MRA complained of, i.e., contributions of money to UWP from the Life Income Fund is also common.

One purpose of a class action is to achieve economics of time and effort. Belford v. American Finance Co., 333 F. Supp. 1243 (D.C. Ga. 1971). Similarly, it has been held that the purpose of a class action is to enable the Court to determine finally the rights of a numerous class of individuals by one common final judgment. Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co., 43 F. Supp. 735 (D.C. Iowa 1942), mod. on other grounds, 133 F.2d 101.

To achieve the foregoing, Plaintiff should be allowed to maintain this suit as a class action.

POINT II

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF UWP.

MRA was incorporated in 1941 as a nonprofit corporation (26a). Its certificate of incorporation specifically provides that its purpose is the advancement of the Christian religion and in particular by furthering the aims and teachings of The Oxford Group, the First Christian Fellowship and the Moral Re-Armament movement as founded by the late Dr. Frank N. D. Buchman (70a, 71a). The certificate of incorporation of UWP does not contain such precise and restrictive language.

UWP was incorporated under the laws of the state of California on July 23, 1968, subsequent to the execution by Plaintiff of both agreements (33a). At this time, Plaintiff was quite active in the Moral Re-Armament movement (64a, 65a) whose purposes and goals differ substantially from those of UWP (62 a, 63a). Recent activities of UWP serve to illustrate the differences in philosophy and purpose between UWP and MRA (64a).

The agreements executed by Plaintiff provide that she is to receive the income derived from the investment of her contribution by the custodian of the Life Income Fund, Kidder, Peabody

and Company. Upon her death, the contribution passes outright to MRA (8a).

Plaintiff alleges that the present activities of UWP do not coincide with the tenets and teachings of the late Dr. Buchman and his Moral Re-Armament movement and that UWP was incorporated for purposes other than those expressly set forth in the corporate charter of MRA (9a). Again, it is important to note that adherence to the teachings and tenets of Dr. Buchman are specifically referred to in the certificate of incorporation of MRA (8a, 62a, 63a).

The motion of UWP for summary judgment is predicated upon six specific points:

(a) that MRA had clear discretion to make the contributions to UWP;

(b) that the activities of UWP are an outgrowth of the activities of MRA prior to the incorporation of UWP and, as such, UWP has the right to carry on with them;

(c) that Plaintiff, prior to the incorporation of UWP, knew of the activities such as "Sing Out" and "Up With People" programs and approved of them;

(d) that Plaintiff has not shown any valid excuse for waiting eight years before bringing this action;

(e) that this action, as a class action, has not been brought in good faith; and

(f) that as a matter of law, this action has not been properly brought as a class action.

Items (a) and (b) supra, overlap the argument offered by MRA and rejected by Judge Bauman. As to those items Plaintiff contends that UWP does not follow the teachings and principles of the Moral Re-Armament movement and should not be the recipient of funds contributed to MRA, a membership corporation expressly established to further the aforesaid principles. (See 46a-49a, 52a-59a, 77a).

The argument of UWP as to the knowledge of Plaintiff of "Sing Out" and "Up With People" programs, item (c) supra, clearly raises a genuine issue of material fact pertinent to injunctive relief. Plaintiff contends that prior to the incorporation of UWP in 1968, these activities were used to disseminate the teachings and principles of the Moral Re-Armament movement as founded by Dr. Buchman, and, after the incorporation of UWP, these programs were used for other purposes. Thus, the knowledge and consent of Plaintiff raises a genuine factual issue relevant and material to the cause of action against UWP.

With respect to item (d) supra, Plaintiff contends that she did not learn of the large contributions of money being made to UWP by MRA until 1972. She further states that upon gaining

such knowledge, she brought this class action (69a). Clearly, the question of the laches of Plaintiff is one of fact and militates against granting summary judgment.

UWP relies upon an injunction entered in an action in the Supreme Court of the State of New York, County of New York, entitled: "Moral Re-Armament, Inc., Petitioner, against The Oxford Group - MRA. [now Caux Challenge - U.S.A.] et al., Respondents", Index Number 4472/71, for its contention that Plaintiff has not brought this action in good faith (38a-41a). To establish the "bad faith" of Plaintiff, clearly a factual question, UWP must show that Plaintiff is acting in concert with Caux Challenge - U.S.A. to violate the injunction and, more importantly, that she does not have any substantial right to protect in this action. The contribution of $50,000.00 made by Plaintiff to further goals and purposes of the Moral Re-Armament movement certainly raises a question of fact as to her purported lack of good faith.

Item (f) is immaterial to the motion before us. It was treated in Point I, supra.

It is fundamental that in ruling on a motion for summary judgment, the function of this Court is to determine whether there is present a genuine issue of material fact, and not to resolve any existing factual issues. United States v. Diebold,

Incorporated, 369 U.S. 654, 82 S. Ct. 993, 8 L. Ed. 176 (1962); Empire Electronics Co. v. United States, 311 F.2d 175 (2d Cir. 1962). Indeed any reasonable doubt is to be resolved against the moving party. Van Brode Milling Co. v. Kravex Mfg. Corp., 21 F.R.D. 246 (E. D. N.Y. 1957). See also: 6 Moore's Federal Practice ¶ 56.15 [1.-0].

Similarly, in United States v. Farmers Mutual Insurance Ass'n, 288 F.2d 560 (8th Cir. 1961) it was stated:

> "In a summary judgment situation, the court may consider admissions and facts conclusively established but all reasonable doubts touching the existence of a genuine issue as to a material fact must be resolved against the movant." 288 F.2d at 562 (emphasis added).

In this connection, it is sound to re-call the admonition of Circuit Judge Jerome Frank in Colby v. Klune, 178 F.2d 872 (2d Cir. 1949):

> "We have in this case one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit,' improper because there is involved an issue of fact, turning on credibility. Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor; and that

> demeanor - absent, of course, when trial is by affidavit or deposition - is recognized as an important clue to witness' credibility. When, then, as here, the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error." 178 F.2d at 873.

See also Fogelson v. American Woolen Co., 170 F.2d 660 (2d Cir. 1948); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

Plaintiff demonstrated and the Record is clear that the corporate purposes of MRA and UWP are expressly different. MRA was incorporated for one specific purpose:

> "A. The advancement of the Christian religion, and in particular by the means and in accordance with the principles of THE OXFORD GROUP and FIRST CENTURY CHRISTIAN FELLOWSHIP, founded by Frank Nathan Daniel Buchman, and its program of MORAL RE-ARMAMENT, whose aim is personal, social, racial, national and supernational [sic] salvation." (62a).

The corporate purposes of UWP do not in any way refer to the foregoing. Moreover, the chief executive officer of UWP, J. Blanton Belk, has expressly rejected any connection between MRA and UWP stating in August, 1970:

> "There is no connection between the Tucson-based Up With People and its founding organization Moral Re-Armament . . ." (66a).

This statement was made at a time when UWP was in the process of receiving $1,753,497.00 from MRA (67a). Clearly, a genuine issue

of material fact is raised by Plaintiff as to whether MRA has abandoned the aims and goals of the Moral Re-Armament movement in favor of financially supporting UWP which has no connection with MRA.

Conclusion.

Accordingly, it is submitted that the Court below erred in denying Plaintiff the right to prosecute this action as a class action. It is further submitted that the granting of summary judgment in favor of UWP was in error since the Record discloses numerous questions of material fact.

Respectfully submitted,

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Plaintiff-Appellant,

-against-

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Defendants-Appellees.

Due service of a copy of the within

.....is hereby admitted.

Dated, New York,....., 19.....

.....

Attorney for.....

COPY

AFFIDAVIT OF SERVICE

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AFFIDAVIT OF SERVICE

Docket Number

74-1547

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WM. LEE KINNALLY, JR., being duly sworn, deposes and says:

I am associated with the firm of Parker, Duryee, Zumino, Malone & Carter, attorneys for Plaintiff-Appellant herein. I am over the age of 21 years and I am an attorney duly licensed to practice in the courts of the State of New York. On July 8, 1974 at approximately 3:15 P.M., I served upon Robert L. Tuttle, attorney for Defendant-Appellee Moral Re-Armament, Inc., two copies of the joint appendix and two copies of Plaintiff-Appellant's brief on this appeal. The aforesaid documents were delivered by me personally to the office of said Robert L. Tuttle, Esq. at 36 West 44th Street, New York, New York. They were deposited ~~in a sealed envelope in the mail slot~~ under the locked office door of his office inasmuch as his office was closed and no one was in charge

of said office when I appeared there.

Wm. Lee Kinnally Jr.
WM. LEE KINNALLY, JR.

Sworn to before me this
8th day of July, 1974

Peter Cyril Langenus
NOTARY PUBLIC

PETER CYRIL LANGENUS
Notary Public, State of New York
No. 31-4502884
Qualified in New York County
Commission Expires March 30, 1975

Received two (2) copies of the within Brief

Dated July 8, 1974

/s/ Henry K. Beyler

Attorney for Defendant - Appellant
Up With People, Inc.